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No. 85-1381

In the Supreme Court of the United States

OCTOBER TERM, 1985

PAUL HELLER, ETC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that the United States has waived its sovereign immunity for torts occurring on military bases in the Philippines.

1. a. Petitioner was stationed at Clark Air Base in the Republic of the Philippines while a member of the United States Air Force. He alleges that his wife died as a result of negligent medical care that she received at a hospital on the base in 1981 and 1982. Petitioner brought this action in the United States District Court for the Eastern District of Pennsylvania against the United States and several individual Air Force employees alleged to have been responsible for his wife's treatment at the base hospital. The district court dismissed the complaint on the ground that petitioner's action against the United States was barred by 28 U.S.C. 2680(k), which provides that the government has

not waived its sovereign immunity in tort for "[a]ny claim arising in a foreign country." Pet. App. 16a-26a; 605 F. Supp. 144, 146.[1]

b. The court of appeals affirmed. Pet. App. 3a-15a; 776 F.2d 92. Relying on this Court's decision in *United States* v. *Spelar*, 338 U.S. 217 (1949), and the decisions of other circuits, which "uniformly have held that [Section 2680(k)] applies to the tortious conduct of foreign based military personnel" (Pet. App. 7a-8a), the court of appeals concluded that petitioner's claim was barred by the foreign country exception because the United States returned Clark Air Base to Philippine sovereignty in 1979. *Id.* at 7a-10a. The court of appeals also held that the Medical Malpractice Immunity Act, 10 U.S.C. 1089, does not independently waive the government's sovereign immunity. Pet. App. 10a-13a.

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is plainly unwarranted.

a. Petitioner argues first (Pet. 6-10) that the foreign country exception to the waiver of sovereign immunity contained in the Federal Tort Claims Act (FTCA) does not apply to military bases in the Philippines, notwithstanding this country's recognition of Philippine sovereignty over those bases, because the United States retains control over its military personnel and civilian employees at the bases. The court of appeals correctly rejected this argument in accordance with this Court's decision in *United States* v. *Spelar, supra*, and an unbroken line of precedent in the lower courts.

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[1]Petitioner failed to serve the individual defendants. Pet. App. 6a n.2. He did not argue on appeal, and does not now argue, that the dismissal as to them was erroneous.

In *Spelar*, the Court held that Section 2680(k) barred a claim arising out of negligence at an air base in Newfoundland operated by the United States pursuant to a long-term lease. In reaching this conclusion, the Court pointed to the legislative history of the FTCA, which demonstrates that Section 2680(k) was intended to bar claims where the law of a foreign country would apply (338 U.S. at 221), and to the fact that the air base was subject to the sovereignty of a foreign nation (*id.* at 219), even though the Court had earlier acknowledged that the United States exercised control over the base. See *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 382 n.4 (1948). Following *Spelar,* the lower federal courts have consistently held that the foreign country exception applies to military bases on foreign soil. See, *e.g., Broadnax* v. *United States Army*, 710 F.2d 865, 867 (D.C. Cir. 1983); *Roberts* v. *United States*, 498 F.2d 520, 522 & n.2 (9th Cir.), cert. denied, 419 U.S. 1070 (1974); *Manemann* v. *United States*, 381 F.2d 704 (10th Cir. 1967); *Grunch* v. *United States*, 538 F. Supp. 534 (E.D. Mich. 1982); *Bryson* v. *United States*, 463 F. Supp. 908, 911 (E.D. Pa. 1978). This rule has been applied whenever the foreign country retains some measure of sovereignty over the territory, regardless of the authority that might be exercised by the United States over its own citizens on the base. See *Burna* v. *United States*, 240 F.2d 720 (4th Cir. 1957); *Bell* v. *United States,* 31 F.R.D. 32, 35 (D. Kan. 1962). Petitioner's reading of Section 2680(k) to apply only to areas over which a foreign country exercises complete control would render the exception inapplicable to overseas bases at which this country's military personnel are stationed, which by their nature must be subject in significant part to the authority of the United States.[2]

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[2]See, *e.g.*, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 1798.

In 1979, the United States expressly agreed that "Philippine sovereignty extends" to military bases on that country's territory. Pet. App. 39a. Petitioner points to nothing in the text or history of the agreement between the United States and the Philippines to suggest that this country intended to except the Philippine bases from the settled interpretation of Section 2680(k). Indeed, even before 1979 torts arising in the Philippine bases had been held to come within that section. *Pedersen* v. *United States*, 191 F. Supp. 95, 99-100 (D. Guam 1961). Accordingly, the court of appeals correctly determined that petitioner's action was barred by the foreign country exception.[3]

b. Petitioner also argues (Pet. 11-18) that 10 U.S.C. (& Supp. II) 1089 waives the government's sovereign immunity for claims arising out of medical malpractice in foreign countries. The court of appeals properly rejected this argument, and the identical result was reached in *Pelphrey* v. *United States*, 674 F.2d 243 (4th Cir. 1982). Cf. *Hawe* v. *United States*, 670 F.2d 652, 653 (6th Cir. 1982), citing *Feres* v. *United States,* 340 U.S. 135 (1950) (Section 1089 does not abrogate *Feres* exception to the FTCA).

Waivers of sovereign immunity, of course, " 'cannot be implied but must be unequivocally expressed.' " *United States* v. *Testan*, 424 U.S. 392, 399 (1976), quoting *United States* v. *King*, 395 U.S. 1, 4 (1969). Nothing in Section 1089 expressly waives the government's sovereign immunity. Rather, 10 U.S.C. (Supp. II) 1089(a) makes "[t]he remedy against the United States provided by [the FTCA]" exclusive for medical torts in the United States, thus

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[3]Petitioner attacks the constitutionality of Section 2680(k) in his questions presented but does not discuss the issue in his petition. He failed to preserve this argument below (Pet. App. 13a), and it is in any event completely meritless. See generally, *e.g., United States* v. *Sherwood*, 312 U.S. 584, 586-587 (1941).

immunizing federal medical personnel in those circumstances. Cf. 28 U.S.C. 2679(b) (immunizing federal drivers). Section 1089(f) provides that the government may indemnify or insure such personnel for liability for torts occurring in foreign countries. Neither subsection makes available a cause of action against the United States or affects the scope of the waiver contained in the FTCA. Indeed, Congress's express abrogation of the intentional tort exception to the FTCA in medical malpractice cases, 10 U.S.C. 1089(e), plainly indicates its intent to preserve the foreign country exception, which is not mentioned in Section 1089.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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